

No. 12782

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CONTROLLER OF THE STATE OF CALIFORNIA,

Appellant,

vs.

ARLIE R. LOCKWOOD, Bankrupt,

Appellee.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

I.

Preliminary Statement.

The first eight pages of "appellee's" brief, consisting for the most part of an attempt to discredit the manner in which appellant has presented his position in Appellant's Opening Brief, would appear to indicate that the trustee in bankruptcy of the Estate of Arlie R. Lockwood is aware of the precariousness of his position insofar as the real issues raised by the appeal herein are concerned. It may be that counsel for the trustee in bankruptcy are seeking to divert attention from the fact that they are not counsel for Arlie R. Lockwood, the appellee herein, although they designate themselves as "Attorneys for Appellee" at the conclusion of "appellee's" brief. [The Court's attention, in this connection, is directed to the District Judge's Findings of Fact, Conclusions of Law and Judgment, Tr. 80-85.]

A. "APPELLEE'S" JURISDICTIONAL STATEMENT.

We note on page 1 of the brief* filed by counsel for E. A. Lynch, Trustee in Bankruptcy of the Estate of Arlie R. Lockwood, Bankrupt, that it is intimated that Appellant's Opening Brief fails to disclose that the Chapter XI proceedings involving Mr. Lockwood terminated, that Mr. Lockwood was thereafter adjudicated a bankrupt, and that Mr. Lynch thereafter qualified as trustee in bankruptcy of Mr. Lockwood's estate. Reference to Appellant's Opening Brief, page 5, will dispose of this point. The Court's attention is also directed to pages 63-85, inclusive, of the transcript wherein the termination of Chapter XI proceedings, the adjudication of Mr. Lockwood and the qualification of Mr. Lynch as trustee in bankruptcy of Mr. Lockwood's estate, are clearly established.

Counsel for Mr. Lynch are entirely correct when they state on page 2 of appellee's brief that the very title of this case on appeal "fails to reveal that E. A. Lynch as trustee in bankruptcy of Arlie R. Lockwood, Bankrupt, is the appellee herein." As appellant has pointed out in his opening brief, Mr. Lynch, as trustee in bankruptcy of the estate of Arlie R. Lockwood, was improperly permitted to prosecute the petition for review filed by Mr. Lockwood. If Mr. Lockwood and appellant herein were the only parties to the review pending before the District Judge, it would appear, accordingly, that these two parties could

*For the sake of simplicity, said brief will be referred to hereafter as "appellee's" brief, without quotation marks, although it is appellant's position that neither E. A. Lynch as trustee in bankruptcy of the Estate of Arlie R. Lockwood, nor the trustee's attorneys could properly prosecute Mr. Lockwood's petition for review after it was abandoned by Mr. Lockwood, no petition for review having been filed by Mr. Lynch while he was acting as receiver in the Chapter XI proceedings which preceded Mr. Lockwood's adjudication.

only be the proper parties on appeal. However, inasmuch as Mr. Lynch was permitted to prosecute Mr. Lockwood's petition for review in the District Court, his attorneys were necessarily served as counsel for an appellee usually would be from that point on. Neither Mr. Lockwood nor counsel in his behalf made any appearance before the District Judge below subsequent to the abandonment by Mr. Lockwood of his petition for review. The only order authorizing Mr. Lynch or his attorneys to appear in the District Court in connection with Mr. Lockwood's petition for review was the Order of the Honorable Benjamin Harrison permitting Harry A. Pines, Esq., of Dechter, Hoyt, Pines and Walsh, attorneys for Mr. Lynch as receiver in the then Chapter XI proceedings relating to Mr. Lockwood, to appear as *amicus curiae* in connection with Mr. Lockwood's petition for review. [Tr. 62, 68, 69.] To our knowledge, Mr. Pines has not requested leave of this Court to appear as *amicus curiae* in connection with the within appeal.

We note also that counsel for the trustee in bankruptcy of Mr. Lockwood's estate claim on page 2 of appellee's brief to be uncertain whether the "Comptroller" referred to in the undertaking for costs on appeal filed by appellant is the "Controller", the appellant herein. We believe that the inadvertent spelling employed by the bonding company is immaterial, and certainly not misleading, in view of the language of the undertaking for costs and the fact that there is a "Controller" of the State of California, and no official having the designation "Comptroller."

B. SPECIFICATION OF ERRORS.

Commencing at page 3 of appellee's brief, counsel for the trustee in bankruptcy of Mr. Lockwood's estate seek to persuade this Court that appellant has "chosen to ignore Rule 20(d) of the Rules of this court" and that Appellant's Opening Brief fails to separately and particularly set forth the errors relied upon by appellant. The invalidity of this contention is best demonstrated by reference to Appellant's Opening Brief, where, commencing at page 36, the three errors urged are set forth and numbered consecutively. The errors urged are, to recapitulate:

1. "The Findings Made by the Referee Are Amply Supported by the Record and Should Not Be Disturbed." (App. Op. Br. 36.)

2. "The Record Herein Clearly Establishes the Tax Liability Upon Which Appellant's Proof of Claim Is Predicated." (App. Op. Br. 43.)

3. "Mr. Lockwood Having Filed the Only Petition for Review of the Referee's Order Allowing Appellant's Claim in Full, and Lockwood Having Abandoned Said Petition, the District Court Erred in Permitting Others to Review the Referee's Order and Others Should Not Be Permitted to Prosecute This Appeal." (App. Op. Br. 47.)

It is apparently the contention of counsel for Mr. Lynch, trustee in bankruptcy of Mr. Lockwood's estate, that appellant's brief is defective because the three points urged, as aforesaid, were not repeated separate and apart from appellant's argument and specifically designated as specifications of error. And this contention is made despite the fact that the three points urged by appellant are simply and clearly set forth in the Topical Index to Appellant's Opening Brief.

As the cases cited by counsel for the trustee in bankruptcy of Mr. Lockwood's estate on pages 3 and 4 of their brief all reiterate, an appellant is under a duty, in his opening brief, to set forth clearly the errors he urges not only to make his position clear to the Court but also to enable opposing counsel to file an adequate brief by way of answer. Referring again to Appellant's Opening Brief, as well as to the transcript herein, it is clear that the Order from which this appeal is being taken is predicated solely upon the District Judge's holding that the only question presented by Mr. Lockwood's petition for review was whether the evidence supports the referee's findings and the District Judge's further holding that the record does not sustain the referee's finding "that Arlie R. Lockwood, doing business as Dependable Oil Co., distributed said amounts of motor vehicle fuel with respect to which 3-cents per gallon tax had not been paid to the State of California." [Tr. 79-81; App. Op. Br. 6, 7.] We are unable to comprehend, in light of the foregoing and in light of the cases cited on pages 3 and 4 of appellee's brief how it may validly be contended that the errors urged by appellant are not numbered and set out separately and particularly, in Appellant's Opening Brief.

C. STATEMENT OF THE CASE.

Continuing in the attempt to discredit the organization rather than the substance of Appellant's Opening Brief, it is contended at the close of page 4 of appellee's brief that Appellant's Opening Brief does not contain a "Statement of the Case" in compliance with Rule 20(c) of this Court. Appellee's brief refers broadly to pages 7-23, inclusive, of Appellant's Opening Brief and ignores entirely the first full paragraph on page 6 of Appellant's Opening Brief, the first full paragraph on page 7 of Appellant's Opening

Brief, as well as sub-titles (a) and (b) under the last mentioned paragraph and the three separately numbered headings under appellee's argument commencing at page 36 of Appellant's Opening Brief, all of which are tied together by the Topical Index to Appellant's Opening Brief. Appellant can again only suggest that counsel's extended criticism of the organization of Appellant's Opening Brief, which represents the best effort of appellant's counsel to simply and clearly delineate the issues raised in light of the factual situation involved, can be predicated only upon a desire to avoid meeting the issues clearly raised by Appellant's Opening Brief in appellant's humble opinion, and to avoid a consideration of the merits of appellant's position.

D. QUESTIONS ON APPEAL.

Although Appellant's Opening Brief, as we have pointed out above, presents three clearly designated points for consideration, counsel for the trustee in bankruptcy of Mr. Lockwood's estate seeks to evade a consideration of those points by setting forth in pages 5 and 6 of appellee's brief certain questions which counsel for the trustee in bankruptcy intimate are sought to be raised by appellant herein.

We respectfully reiterate, as set forth in Appellant's Opening Brief, that the questions presented on this appeal are:

1. Whether the District Judge properly upset the referee's findings which are amply supported by the record;
2. Whether the record establishes the tax liability upon which appellant's proof of claim is predicated;

3. Whether others than Mr. Lockwood were properly permitted to prosecute the petition filed by Mr. Lockwood, and whether others than Mr. Lockwood should be permitted to prosecute this appeal.

As we have stated above and in our Opening Brief [see the District Judge's Memorandum on Review—Tr. 73-80—particularly the next to the last paragraph thereof, commencing at the close of page 79 of the transcript; App. Op. Br. 6, 7] the District Judge predicated his reversal of the referee's order solely upon the conclusion that the evidence adduced before the referee does not support the referee's findings. It is submitted that a reading of Appellant's Opening Brief will clearly disclose that appellant is contending primarily that there was a valid tax liability on the part of Mr. Lockwood; that the evidence adduced before the referee amply supports the referee's findings; and, incidentally, that parties other than Mr. Lockwood, the sole petitioner for review, were permitted to prosecute that petition after Mr. Lockwood had abandoned it.

E. PERTINENT PROVISIONS OF THE CALIFORNIA MOTOR VEHICLE FUEL LICENSE TAX LAW.

Continuing with the attempt to obscure the true issues raised in this appeal, appellee's brief at pages 7 and 8 takes exception to the manner in which Appellant's Opening Brief seeks to convey to the Court a general picture of the California Motor Vehicle Fuel License Tax Law.

Appellee's brief directs the Court's attention to the fact that Section 7351 of the Motor Vehicle Fuel License Tax

Law, California Revenue and Taxation Code, was amended in 1947, the amendment being effective July 1, 1947. The amendment is of no materiality insofar as this appeal is concerned inasmuch as the section as reproduced in Appellant's Opening Brief clearly discloses the rate of tax in effect during the period involved herein. Similarly, the inclusion of subdivision (e) in appellant's reproduction of Section 7305 of the California Motor Vehicle Fuel License Tax Law in no way impinges upon a consideration of the issues involved herein. We are unable to perceive that the substitution of the word "determination" for the word "assessment" in Section 7353 of the California Motor Vehicle Fuel License Tax Law is material to a consideration of the issues involved in this appeal inasmuch as these words are synonymous and are used interchangeably insofar as the California taxing structure as a whole is concerned.

Although we believe that the portion of Appellant's Opening Brief devoted to the exposition of the pertinent provisions of the California Motor Vehicle Fuel License Tax Law has not misled counsel and will certainly not mislead this Court but will serve only to assist the Court in obtaining an over-all view of the taxing statute involved, we have felt it necessary to refer to this portion of appellee's brief as it infers the possibility of intentional misrepresentation on the part of appellant's counsel, and, worse yet, seeks to becloud the basic issues clearly presented by appellant in his Opening Brief.

II.

Reply to the Portion of Appellee's Brief Entitled
"Argument."

Pages 9 to 12, inclusive, of appellee's brief purport to demonstrate that the referee's findings are not supported by the record; that the findings were, accordingly, properly set aside by the District Court. A careful analysis of this portion of appellee's brief discloses no answer to the analysis of testimony and evidence contained in Appellant's Opening Brief, pages 8 to 23, inclusive. We are unable to perceive how it may validly be contended, as appellee's brief apparently attempts to contend, that the record below contains only uncontradicted evidence that the taxable distributions upon which appellant's proof of claim was predicated did not take place. It would appear that appellant could much more plausibly contend that the record below discloses without more than ephemeral contradiction that the taxable distributions in question did occur.

Commencing at page 13 of appellee's brief, counsel for the trustee in bankruptcy of Mr. Lockwood's estate, contend that the District Court was not bound by the referee's Conclusions of Law nor by his unsupported Findings of Fact. We are entirely in accord with that contention. The fundamental question raised by appellant in this appeal (see App. Op. Br.) is that the District Court was bound by the referee's Findings of Fact which are supported by the record. As we have pointed out in the preceding paragraph, we are unable to perceive how it may be validly contended that there was no conflict in the testimony and evidence adduced before the referee.

Commencing at page 14 of appellee's brief, we find a discussion relating to the burden of proof in hearings upon objections to tax lien claims in bankruptcy. We are un-

able to perceive the materiality of this discussion inasmuch as appellant abided by the referee's ruling that appellant had the burden of going forward, not only the burden of proof. As reference to Appellant's Opening Brief will disclose, appellant raises no issue here regarding the propriety of the referee's ruling.

The closing portion of the argument contained in appellee's brief seeks to establish the right of Mr. Lynch, both as Receiver under Chapter XI and thereafter as trustee in bankruptcy of Mr. Lockwood's estate, to prosecute the petition for review filed by Mr. Lockwood while Mr. Lynch was receiver under Chapter XI for Mr. Lockwood's estate. Counsel for Mr. Lynch seek to brush aside the fact that where an adjudication terminates pending Chapter XI proceedings, the adjudication relates back to the date the Chapter XI petition was filed. Also ignored is the fact that Mr. Lynch, as receiver, took over all the assets possessed by Mr. Lockwood when the Chapter XI petition was filed. This is not a situation involving a cause of action possessed by a bankrupt prior to the commencement of bankruptcy proceedings. To the contrary, we are concerned here with a review taken in connection with an order made by a referee in bankruptcy during the pendency of Chapter XI proceedings, the debtor and the receiver being parties to that order. Although it does not appear necessary at this point to discuss at length the application of the principles of *res judicata* and the confusion which would result if it were held by this Court that in every instance where a Chapter XI proceeding is followed by an adjudication the

trustee in bankruptcy may prosecute a petition for review to which the receiver was not a party.

It should be noted in passing, as we have pointed out in the preliminary portion of this brief, that the District Court permitted counsel for the receiver to appear as *amicus curiae* in connection with Mr. Lockwood's petition for review and not the receiver.

Although Section 70(a) of the Bankruptcy Act, 11 U. S. C., Section 110, is referred to in appellee's brief, it should be noted that subdivision (a) of that section specifically provides that "The trustee of the estate of a bankrupt and his successor or successors, if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt *as of the date of the filing of the petition in bankruptcy or of the original petition proposing an arrangement or plan under this Act.*"

Conclusion.

It is to be regretted that appellee's brief seeks to avoid the basic issues presented by appellant by attempting to plead inability of counsel to perceive the matters clearly set forth in Appellant's Opening Brief. At any rate counsel for the trustee in bankruptcy of Mr. Lockwood's estate have attempted in their argument to demonstrate that the Findings of the referee are not supported by the record and at least issue has been joined with respect to the primary question involved. Insofar as this issue is concerned, it is again submitted that a perusal of the entire record herein can lead only to one conclusion, namely, that

the Findings of the referee are amply supported by the record and should not have been disturbed by the District Judge. The propriety of the District Court's action in permitting others than a petitioner for review to prosecute a petition after abandonment by the petitioner is a matter of concern to this Court in its supervision of the operation of the Bankruptcy Courts in this circuit. Issue on this point has likewise been joined, as the general discussion contained under Point IV of appellee's brief demonstrates.

It is submitted that the Order of the District Judge should be reversed and the Findings and Order of the referee reinstated.

Respectfully submitted,

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